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IN THIS ISSUE

ALJ Rejects New York City's Attempt to Forcibly Combine Bank and Its Non-New York City Mortgage Subsidiary
Page 1

Tribunal Amends Decision Upholding Disallowance of Nonresident Partner's Loss from Disposition of Partnership Interest
Page 2

Court of Appeals Affirms Not-For-Profit Property Tax Exemptions in Two Cases
Page 3

Tribunal Upholds Corporate Officer Liability for Sales Tax Despite Creditor's "Sweep Arrangement" with Corporation
Page 4

ALJ Upholds Disallowance of Charitable Deduction and Includes Disputed Items in Income
Page 6

Insights in Brief
Page 7

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ALJ REJECTS NEW YORK CITY'S ATTEMPT TO FORCIBLY COMBINE BANK AND ITS NON-NEW YORK CITY MORTGAGE SUBSIDIARY

The New York City Chief Administrative Law Judge has issued a decision holding that Astoria Bank was not required to include in its combined New York City bank tax returns its Connecticut subsidiary that held non-New York mortgage loans. *Matter of Astoria Financial Corporation & Affiliates*, TAT (H) 10-35 (BT) *et al.* (N.Y.C. Tax App. Trib., Admin. Law Judge Div., Oct. 29, 2014). The Chief ALJ concluded that the subsidiary had economic substance, was formed for legitimate business purposes, and conducted its transactions with Astoria at arm's length. She held that there was no agreement or arrangement with the subsidiary that caused the bank's income to be improperly or inaccurately reflected.

The Chief ALJ also rejected the Department of Finance's contention that the New York State Tax Appeals Tribunal decision in *Matter of Interaudi Bank*, DTA No. 821659 (N.Y.S. Tax App. Trib., Apr. 14, 2011) was binding precedent. The Chief ALJ found that because the facts in *Interaudi* were distinguishable, and *Interaudi* did not articulate a new legal principle, it did not constitute binding precedent. She concluded that, unlike in *Interaudi*, there was no "mismatch" of income and expenses where the interest deductions taken by the bank could not be correlated to the mortgage income earned by the subsidiary. The Chief ALJ also emphasized that a capital contribution of mortgage assets to a subsidiary is not *per se* a distortive transaction, citing the State Tribunal decision in *Matter of U.S. Trust Corp.*, DTA No. 810461 (N.Y.S. Tax App. Trib., Apr. 11, 1996).

As we went to press, the Department of Finance filed an Exception to the decision.

Irwin M. Slomka and Kara M. Kraman of Morrison & Foerster LLP represented Astoria Bank in this case.

continued on page 2

TRIBUNAL AMENDS DECISION UPHOLDING DISALLOWANCE OF NONRESIDENT PARTNER'S LOSS FROM DISPOSITION OF PARTNERSHIP INTEREST

By Kara M. Kraman

Last April, the New York State Tax Appeals Tribunal issued a decision holding that a nonresident partner in a partnership that owned New York City real property could not source to New York a loss from his disposition of the partnership interest. *Matter of Craig A. Olsheim*, DTA No. 824218 (N.Y.S. Tax App. Trib., Apr. 10, 2014). Despite having prevailed in the case, the Department filed a motion for reargument seeking correction of certain aspects of the decision. On November 13, 2014, the Tribunal granted the Department's motion in an order and opinion, and issued an amended decision upholding the Tribunal's original decision that a nonresident partner properly included his share of the gain from the partnership's 2005 sale of a New York office building in his New York source income, but improperly included the loss from his 2005 disposition of an interest in that same partnership. However, the Tribunal modified certain aspects of its analysis consistent with the Department's motion. *Matter of Craig A. Olsheim*, DTA No. 824218 (N.Y.S. Tax App. Trib., Nov. 13, 2014).

The underlying case involved a nonresident individual, Craig A. Olsheim, who was a limited partner in a partnership whose sole asset was an office building located in New York City. Because he had inherited his partnership interest, Mr. Olsheim's "outside basis" in his partnership interest (based on its fair market value) was more than his pro rata share of the partnership's "inside basis" in the office building. In 2005, the partnership sold the office building and then dissolved. Mr. Olsheim reported his pro rata share of the partnership's gain from the sale of the building on his New York State nonresident personal income tax return and claimed a capital loss resulting from the dissolution of the partnership. After an audit, the Department issued a Notice of Deficiency, disallowing the loss on the grounds that it was not New York source income or loss.

An ALJ had held that Mr. Olsheim improperly included the loss from the disposition of his partnership interest in his New York source income. The Tribunal then affirmed the ALJ's determination, explaining that whereas New York source income includes gain from the sale of real property located in the State, at the time of the partnership's liquidation in 2005, the disposition of an interest in a partnership was considered a disposition of intangible personal property. Intangible property is sourced to New York only to the extent that the intangible is employed in a "business, trade, profession or occupation carried on" in New York. Tax Law § 631(b)(2). In its April 2014 decision, the Tribunal examined whether the *partnership* was engaged in a business carried on in New York, found that there was no evidence in the record that it was, and disallowed the loss. After the Department filed a Notice of Motion Motion for Reargument, the Tribunal issued an order and opinion granting the motion.

In its amended decision, the Tribunal held that its earlier inquiry as to whether the partnership was employed in a business, trade, profession, or occupation in New York was incorrect. The Tribunal clarified that the correct inquiry is whether the *partnership interest*, not the partnership, is employed in a business in New York.

Regardless, the Tribunal concluded that in the matter before it, such an analysis was not possible because Mr. Olsheim had not introduced any evidence regarding how his *interest* in the partnership was employed in a New York trade or business. Accordingly, the Tribunal upheld its original determination.

In its amended decision . . . [t]he Tribunal clarified that the correct inquiry is whether the *partnership interest*, not the partnership, is employed in a business in New York.

In its separate order and opinion the Tribunal also struck the portion of its decision holding that Mr. Olsheim would have been permitted to include the loss as part of his New York source income had the dissolution taken place after the 2009 enactment of Tax Law § 631(b)(1)(A)(1), which now provides that nonresidents must include as New York source income gain or loss from an interest in certain partnerships that hold real property, on the grounds that it was not necessary or helpful to the resolution of the issues in the case, and was pure dicta.

Additional Insights

While the change of the inquiry from whether the *partnership* is employed in a business a in New York, to whether the *partnership interest* is employed in a business in New York did not affect the outcome of this case, this is an important distinction. For example, if Mr. Olsheim had otherwise conducted business in New York and used his interest in the partnership as loan collateral as part of that business, presumably his partnership interest would have been employed in business carried on in New York, and he

continued on page 3

could have claimed the loss from his sale of that interest on his New York nonresident personal income tax return. In contrast, the fact that the partnership itself carried on business in New York, without more, would not have been enough to allow Mr. Olsheim to claim the loss on his New York nonresident personal income tax return. Since May 7, 2009, however, gain or loss from a sale or exchange of an interest in a partnership, LLC, S corporation, or non-publicly traded C corporation with 100 or fewer shareholders is considered to be from New York sources if 50% or more of the entity's assets consist of real property located in New York State.

COURT OF APPEALS AFFIRMS NOT-FOR-PROFIT PROPERTY TAX EXEMPTIONS IN TWO CASES

By Michael J. Hilkin

In two separate cases released on the same day, the New York Court of Appeals concluded that properties used by not-for-profit corporations to house individuals were exempt from property taxation on the basis that the properties were primarily used by the not-for-profits in advancement of their charitable purposes. *Matter of Maetreum of Cybele, Magna Mater, Inc. v. McCoy*, 2014 NY Slip Op. 07929 (N.Y. Nov. 18, 2014); *Matter of Merry-Go-Round Playhouse, Inc. v. Assessor of City of Auburn*, 2014 NY Slip Op. 07928 (N.Y. Nov. 18, 2014).

Applicable Law

RPTL § 420-a(1)(a) exempts from real property taxation "[r]eal property owned by a corporation or association organized or conducted exclusively" for charitable, religious, educational, and/or moral or mental improvement purposes, as long as the property is "used exclusively" for such purposes. The Court of Appeals has held that the determination of whether a property is used "exclusively" for exempt purposes depends upon "whether the particular use is reasonably incidental to the primary or major purpose of the facility," or, "[p]ut differently, . . . whether the property is used exclusively for the statutory purposes depends upon whether its *primary use* is in furtherance of the permitted purposes." *Matter of Yeshivath Shearith Hapletah v. Assessor of Town of Fallsburg*, 79 N.Y.2d 244, 250 (1992) (emphasis added).

***Maetreum of Cybele* Case**

Facts. Maetreum of Cybele, Magna Mater, Inc. ("Maetreum of Cybele"), is the corporate entity for the Cybeline Revival, a pagan following founded in 1999. The Cybeline Revival's fundamental religious principle is that the divine feminine, the mother goddess Cybele, is present in everything, thereby creating a connection in all living things, as well as giving rise to an obligation to do charitable work and a responsibility to improve the conditions of all people, particularly women.

Maetreum of Cybele owned a parcel of real property within the Town of Catskill, with a main house, a small caretaker's cottage, several buildings, an outdoor temple, and "processional paths." Maetreum of Cybele's activities on the parcel include nightly praise, religious instruction and spiritual counseling, marriage and death rituals, bi-weekly new moon and full moon celebrations, an annual pagan pride festival, a weekly open café, a monthly pagan brunch, and a monthly, more secular, bisexual brunch. Several of the Cybeline Revival's priestesses live on the parcel, and testimony established that convent-style living is a component of the Cybeline Revival.

Procedural history and decisions. In 2009, 2010, and 2011, Maetreum of Cybele, which received tax-exempt status from the Internal Revenue Service, filed applications for exemption from real property taxes under RPTL § 420-a. Each application was denied by the Town of Catskill's Town Assessor (the "Catskill Assessor") and the Board of Assessment Review for the Town of Catskill. Maetreum of Cybele petitioned the New York State Supreme Court, which held a non-jury trial where Maetreum of Cybele called witnesses but the Catskill Assessor called none. The Supreme Court judge nonetheless ruled against Maetreum of Cybele, concluding that the primary use of the parcel is to "provide affordable cooperative housing to a small number of co-religionists" and that the exempt uses are "merely incidental to that primary non-exempt use."

The Appellate Division reversed, finding that the trial testimony demonstrated that Maetreum of Cybele "uses the [parcel] primarily for its religious and charitable purposes," and was therefore entitled to a property tax exemption for the years in question. *Matter of Maetreum of Cybele, Magna Mater, Inc. v. McCoy*, 111 A.D.3d 1098 (3d Dep't 2013). The Catskill Assessor argued that the previous owners transferred the parcel to Maetreum of Cybele and continued its former residential use, as evidenced by the fact that financial support for the parcel continued to come from the few adherents. The Appellate Division, however, determined that the Catskill Assessor was effectively contending that to qualify for the exemption under RPTL § 420-a, "some threshold amount of activity and public benefit" must be shown, and determined that the actual applicable standard "is simply whether the property was used primarily for religious and charitable purposes." The Appellate Division found sufficient evidence that the Cybeline Revival "stresses communal living among its adherents, as well as providing hospitality and charity to

continued on page 4

those in need, and the members consider [the parcel] the home of their faith."

The Catskill Assessor appealed to the Court of Appeals, which affirmed the Appellate Division decision. The Court of Appeals explicitly relied on its precedent defining the term "exclusively" as used in RPTL § 420-a(1)(a) in a more relaxed fashion, but provided no other analysis.

***Merry-Go-Round* Case**

Facts. Merry-Go-Round Playhouse, Inc. ("Merry-Go-Round") operates two theaters: a professional summer stock theater in the City of Auburn, and a youth theater that tours New York State. Merry-Go-Round recruits actors and staff for its summer stock theater nationwide, and has traditionally provided housing to help compensate actors and staff for their relatively low salary and the temporary nature of their employment. In 2011, Merry-Go-Round purchased two apartment buildings for use by its actors and staff. The apartment buildings are not open to the public, and no income is derived from the buildings. Merry-Go-Round argued that the buildings eased its previous burden of obtaining apartments from landlords, and "aided in cultivating a community among its artists." Merry-Go-Round highlighted that the actors and staff "spend countless volunteer hours, offstage and offtheclock, running lines together, discussing creative ideas, working on wardrobes, creating sets and working in the furtherance of the purposes and mission of Merry-Go-Round." Merry-Go-Round also received tax-exempt status from the Internal Revenue Service.

Procedural history and decisions. Merry-Go-Round filed applications for real property tax exemptions with the City of Auburn Town Assessor (the "Auburn Assessor") under RPTL § 420-a. Such applications were denied by the Auburn Assessor and by the City of Auburn's Board of Assessment Review. Merry-Go-Round appealed to the New York State Supreme Court, which determined on summary judgment that Merry-Go-Round was not entitled to the exemption because it had failed to establish either that its summer stock theater was a proper tax exempt purpose under RPTL § 420-a, or that the use of the apartment buildings to house employees was reasonably incidental to its primary purpose.

The Appellate Division reversed. It first determined that Merry-Go-Round was organized exclusively for the tax-exempt purpose of "showcasing and encouraging appreciation of the performing arts, thereby advancing the education, as well as the moral and mental improvement of, the community." Further, the Appellate Division concluded that Merry-Go-Round sufficiently demonstrated that its use of the apartment buildings was reasonably incidental to its primary purpose because the buildings "helped to establish a community among its artists."

The Auburn Assessor appealed to the Court of Appeals, which affirmed the Appellate Division decision. The Court of Appeals first agreed that Merry-Go-Round was "clearly" organized exclusively for a purpose exempt under RPTL § 420-a, and that the summer stock theater was sufficiently geared toward the exempt purpose of promoting the arts. Next, the Court of Appeals applied the same precedent highlighted in the *Maetreum of Cybele* case and concluded that the apartment buildings were used as required under RPTL § 420a(1)(a) to claim the exemption. The Court of Appeals pointed out that its own precedent had applied the RPTL § 420-a exemption to housing provided for employees working for hospitals, universities, and religious summer camps, and reasoned that the use of the housing owned by Merry-Go-Round was sufficiently similar to the use of the housing properties in those other cases.

Additional Insights

The *Maetreum of Cybele* and *Merry-Go-Round* decisions highlight the practical approach the Court of Appeals has previously taken in interpreting the requirement under RPTL § 420-a(1)(a) that property be used "exclusively" for an exempt purpose. Rather than holding that only property used to directly advance an exempt purpose can be exempt from real property taxation, the Court has recognized that providing housing to employees or religious adherents can be integral to advancing a not-for-profit entity's cause. As stated by the Court of Appeals in earlier decisions applying RPTL § 420-a, although exemption statutes should be strictly construed, they nonetheless should not be interpreted so narrowly as to defeat their settled purpose.

TRIBUNAL UPHOLDS CORPORATE OFFICER LIABILITY FOR SALES TAX DESPITE CREDITOR'S "SWEEP ARRANGEMENT" WITH CORPORATION

By Irwin M. Slomka

The Tax Appeals Tribunal has upheld an Administrative Law Judge decision that an officer of a defunct car dealership was personally liable for the corporation's New York sales tax liabilities, despite his claim that the corporation's "sweep arrangement" with its largest creditor precluded him from exercising his responsible officer authority. *Matter of Patrick Kieran*, DTA No. 823608 (N.Y.S. Tax App. Trib., Nov. 13, 2014).

continued on page 5

Facts. Patrick Kieran was the president and part-owner of Bay Chevrolet, Inc., a now-defunct General Motors ("GM") car dealership that previously operated in Douglaston, Queens. Mr. Kieran had acquired the franchise from GM, in part through funding that was financed by General Motors Acceptance Corporation ("GMAC"). GMAC also provided the financing for the dealership's car inventory purchases. As was typical for GM authorized dealerships, as a condition for the financing, GMAC required a "sweep arrangement," under which it had access to the company's bank accounts that were used to, among other things, deposit customer payments, including sales tax collected from customers.

After Bay Chevrolet encountered financial difficulties, GMAC exercised its rights under the sweep arrangement and collected amounts due from the company directly from the dealership's bank accounts, which included the sales tax collected from customers. Bay Chevrolet failed to timely file four consecutive quarterly New York State sales tax returns and to remit to the Department sales tax that the dealership had collected. Bay Chevrolet eventually filed for bankruptcy, and the Department issued estimated notices of determination both to the corporation and to Mr. Kieran as a responsible person.

As president of Bay Chevrolet, Mr. Kieran was responsible for day-to-day operations and had full authority to, among other things, sign checks, tax returns, and bank documents. He dealt with GM and GMAC on all significant business matters, ordered inventory, and hired and fired employees. Faced with the statutory notices subjecting him to personal liability for sales tax collected but not remitted, Mr. Kieran claimed that he was not "under a duty to act" for the corporation, allegedly because he did not have control over the payment of the corporation's taxes as a result of GMAC's sweep arrangement. The Department argued that he "voluntarily" agreed to GMAC's seizure of the corporation's funds and therefore should be held personally liable. Mr. Kieran did not submit into evidence the dealership's financing agreement with GMAC, despite having been given the opportunity to do so even after the hearing concluded.

The law. Personal liability for unpaid sales tax is imposed on any person required to collect and pay over the sales and use tax. Tax Law § 1133(a). This includes a corporate officer, director, or employee who is "under a duty to act" for the corporation in complying with its sales tax obligations. Tax Law § 1131(1). A person who is authorized to sign a corporation's tax returns, or who is responsible for maintaining the corporate books or for corporate management, is considered to be "under a duty to act" and can be personally liable for the corporation's unpaid sales tax obligations. 20 NYCRR 526.11.

ALJ determination. An ALJ had held that Mr. Kieran was "under a duty to act," finding that he displayed all of the necessary indicia of being a person responsible to collect the sales tax. The ALJ rejected his claim that he did not have sufficient authority to pay over the taxes collected. (See *New York Tax Insights*, Oct. 2013, for a discussion of the case before the ALJ.)

In his appeal to the Tribunal, Mr. Kieran continued to argue that he lacked the requisite control over the business after GMAC invoked the sweep arrangement. He maintained that his case was distinguishable from other unfavorable Tribunal precedent because the sweep arrangement took effect before the subject sales taxes accrued.

Mr. Kieran claimed that he was not "under a duty to act" for the corporation, allegedly because he did not have control over the payment of the corporation's taxes as a result of GMAC's sweep arrangement.

Tribunal decision. The Tribunal found that the facts "strongly support" the conclusion that Mr. Kieran was a responsible person, and affirmed the ALJ decision. According to the Tribunal, Bay Chevrolet's economic difficulties were the root cause of its failure to remit sales tax collected, which in turn caused GMAC to sweep the dealership's bank accounts, thereby diverting the collected sales tax to other purposes. The Tribunal concluded that "neither of these related causes . . . relieve petitioner from his duty as a responsible person to see that sales tax collected by the dealership was turned over to the Division."

The Tribunal noted several times in its decision that the sweep arrangement was "voluntarily" entered into with GMAC. Mr. Kieran sought to distinguish the case from the Tribunal decision in *Matter of Button*, DTA No. 817034 (N.Y.S. Tax App. Trib., Jan. 28, 2002), where the Tribunal held that two corporate officers were personally liable for sales tax, but where the taxes in issue accrued *before* the creditor seized the corporate bank account. The Tribunal disagreed, finding the underlying principles in *Matter of Button*—that voluntarily giving a creditor access to a corporate bank account resulting in the nonpayment of the corporation's sales tax obligations was a "dereliction of duty" by the corporate officer—were equally applicable here. The Tribunal also noted that the record did not contain any evidence of affirmative steps taken by Mr. Kieran to make sure that the sales tax, a "trust fund tax" collected by the dealership, was paid over to the State.

continued on page 6

Additional Insights

Although the officer's circumstances in light of the financial pressures placed on the dealership may be worthy of sympathy, the Tribunal's decision upholding personal liability is not surprising, particularly since the decision involved sales tax actually collected from customers by the dealership—that is, "trust fund" taxes that Mr. Kieran was obligated to make sure was remitted to the State, notwithstanding the sweep arrangement with GMAC. The Tribunal decision leaves open what the outcome would have been if Mr. Kieran had been *forced* to surrender all control over the business to GMAC, and thus truly had no ability to pay over the sales taxes collected. Needless to say, when it comes to liability for sales tax actually collected from customers, a responsible corporate officer has an almost insurmountable burden to escape personal liability for those trust fund taxes.

ALJ UPHOLDS DISALLOWANCE OF CHARITABLE DEDUCTION AND INCLUDES DISPUTED ITEMS IN INCOME

By Hollis L. Hyans

An Administrative Law Judge has held that a married couple's claimed charitable deduction should be denied as unsubstantiated, and that various amounts reported as wages and income to the husband should be included in his taxable income. *Matter of Rabbi Milton Balkany and Sara Balkany*, DTA No. 823424 (N.Y.S. Div. of Tax App., Nov. 13, 2014).

Facts. With regard to the deduction, Rabbi Balkany and his wife reported a charitable deduction of $500,000 for 2005, the year in issue, although the Balkanys themselves did not make the charitable donations, and the payments were not made directly to a qualifying charity. The Balkanys claimed, first, that approximately $420,000 was paid to vendors, employees, and creditors of Bais Yaakov, a religious school that qualified as a charitable organization under Section 501(c)(3) of the Internal Revenue Code, by their son, Levi Balkany, for the benefit of Bais Yaakov. They also claimed that a third party, Rite Surgical Supplies, Inc. (referred to as "Rite Care"), a company 50% owned by Levi, paid amounts to Levi that were in fact owed to Rabbi Balkany as compensation for his business connections that had resulted in substantial revenue for Rite Care. Levi then remitted the funds to the creditors and not to Rabbi Balkany because the Rabbi did not always have a bank account in which to deposit the money.

Rabbi Balkany also challenged the inclusion of two items of income that had been reported to the IRS. Bais Yaakov, where Rabbi Balkany taught, had reported that he had received $180,000 in wages, but Rabbi Balkany claimed that he had foregone $80,000 of that amount to allow the school to pay its debts, and that the $80,000 formed part of the $500,000 charitable deduction. He also argued that, although Rite Care had issued a Form 1099 reporting the payment of approximately $420,000 to him as miscellaneous income, the Form 1099 was issued in error, because it did not represent income to him but rather payment for the school's debts. He claimed that, while initially Rite Care had directly written checks covering the school's expenses, because these expenses had nothing to do with Rite Care's business, Levi's business partner believed it was better to place the funds into Levi's account. Levi then issued the checks to the school's creditors, but since Levi was merely a conduit, the Form 1099 was issued to Rabbi Balkany.

On their 2005 federal return, the Balkanys had claimed the same $500,000 charitable deduction. They benefitted from the Katrina Emergency Tax Relief Act of 2005 which, among other benefits, temporarily modified the rules relating to charitable deductions by removing the usual 50% contribution base limitation, allowing greater deductions to be claimed. New York had not adopted this federal provision into the Tax Law. The Balkanys provided a letter from the IRS indicating abatement of a tax assessment, and although the Balkanys were provided additional time after the hearing to submit further documentation of their position relating to the IRS review of the charitable deduction issue, no such submission was made. They were also given an opportunity to submit documentation that Bais Yaakov authorized and directed payments to the third parties, but no evidence was provided.

ALJ decision. While accepting some of the legal positions argued by the Balkanys, the ALJ held they had failed to establish the underlying facts. The ALJ found merit in the legal argument that, if a third party (such as Rite Care), owes money to a taxpayer (such as Rabbi Balkany), payments made by the third party, or its designee (such as Levi Balkany), that are debited to the taxpayer's account, and that reduce the amount owed to the taxpayer, can be treated as having been made by the taxpayer. The ALJ also agreed that the payments need not have been made directly to the charitable organization, noting that in Revenue Ruling 81-110, where individual X made a binding pledge to a charitable organization that was honored by Y, Y is considered to have made a gift to X, and X, but not Y, was entitled to a charitable deduction, because the payment of money or property in satisfaction of an individual's legal obligation is equivalent to a payment directly to that individual.

continued on page 7

The ALJ found several problems with the Balkanys' arguments and reliance on Revenue Ruling 81-110. Bais Yaakov was not their creditor, but at most a donee, and the payments were not in satisfaction of any binding legal obligation from the Rabbi to the school. The payments did not go from Rite Care to the charity that was allegedly the Balkanys' creditor, but instead went to Levi, who also did not pay the charity but instead paid others that he claimed were owed money by the school.

[T]he ALJ held there was no substantiation in the record to support charitable contributions [since] [m]any of the checks listed on a check register were unidentified, the register was not contemporaneously prepared, and there was no proof as to where the payments actually went . . .

However, even if the indirect payments were attributed to the Balkanys, the ALJ held there was no substantiation in the record to support charitable contributions. Many of the checks listed on a check register were unidentified, the register was not contemporaneously prepared, and there was no proof as to where the payments actually went or that they were in satisfaction of the debts of the school. There was no acknowledgment from Bais Yaakov that it received donations or directed payments to creditors or even proof that the amounts were in fact owed to creditors. Observing that "at the end of a tax year with poor records at best, someone attempted to become creative with large sums of income and expenses, and take advantage of the charitable deduction limitation waiver under Hurricane Katrina legislation," the ALJ determined that the recordkeeping of any charitable contributions was "grossly incomplete," and the testimony of both the Rabbi and his son was "unreliable and conflicting."

She also determined that there was no evidence that Rabbi Belkany had actually foregone $80,000 of salary, so that the full $180,000 reported by Bais Yaakov should be treated as his salary. Similarly, she found a complete lack of acceptable evidence that the $420,000 reported as 1099 income from Rite Care was not income to the Rabbi, and held that it was includable in income as well.

Additional Insights

While the trail of payments and alleged motivations in this case were quite complex, the legal principles and applicable rules are fairly clear. Payments made by a third party to pay a binding obligation of a taxpayer may, under the right circumstances, be treated for tax purposes as if they had been made by the taxpayer. However, as in any case involving charitable donations, the record must be clear and well supported by documentary evidence and credible testimony. Similarly, if wages and Form 1099 income have been reported to the federal and state authorities, any attempt to show the reported amounts were incorrect must be firmly supported by documentary evidence. Here, documentary evidence was missing and the ALJ did not find the witnesses credible.

INSIGHTS IN BRIEF

Driver's License Suspension for Unpaid Sales Tax Upheld in Two Separate ALJ Decisions

Tax Law § 171-v, effective March 28, 2013, provides for the enforcement of past due New York State tax liabilities in excess of $10,000 through the suspension of drivers' licenses pursuant to a 60-day advance notice. A taxpayer can challenge a notice of proposed suspension under certain circumstances, including by showing that the past due tax liabilities have been satisfied. Two recent Administrative Law Judge decisions have granted summary judgment to the Department, upholding drivers' license suspensions where the taxpayers failed to establish any of the grounds for challenging a license suspension. *Matter of Ivan Rivas*, DTA No. 825897 (N.Y.S. Div. of Tax App., Nov. 13, 2014); *Matter of Susan Miller*, DTA No. 825888 (N.Y.S. Div. of Tax App., Oct. 23, 2014).

Tax Department Revises Sales Tax Policy on Storage in Transit

A technical memorandum has been issued by the New York State Department of Taxation & Finance explaining its revised sales tax policy regarding storage in transit provided as part of a transportation service otherwise exempt from sales tax. *Revised Tax Department Policy on Storage in Transit*, TSB-M-14(16)S (N.Y.S. Dep't of Taxation & Fin., Nov. 17, 2014). Currently, storage in transit (which generally results from events that delay delivery to the customer's destination) for a period exceeding 30 days is subject to sales tax. Storage for 30 days or less is not subject to sales tax as long as the service was provided by the mover in connection with the mover's transportation of the goods. Under the revised policy, the Department will recognize storage in transit as incidental to the provision of an exempt transportation service, and thus as not taxable, under certain conditions, including that any charge for storage in transit made or identified prior to the commencement of the service must not exceed the transportation charge. The revised policy will apply to contracts for transportation services executed on or after January 1, 2015.

continued on page 8

Tribunal Affirms Denial of Sales Tax Exemption to Horse Stable

The New York State Tax Appeals Tribunal has affirmed an Administrative Law Judge decision denying a sales tax exemption for the service of boarding horses and for the receipts from certain horse sales to a Long Island commercial horse boarding facility. *Matters of Theodore P. Demetriou and New Windsor Stables, Inc.*, DTA Nos. 824430 and 824431 (N.Y.S. Tax App. Trib., Nov. 10, 2014). The Tribunal found that, while a sales tax exemption exists for services rendered "with respect to tangible personal property for use or consumption … in a commercial horse boarding operation," that exemption applied only to property used by the commercial horse boarding operation to provide horse boarding services, and not to the service of boarding horses itself. The Tribunal also relied on documentation provided by the facility's previous representative to determine taxable horse sales, and found that the facility had offered no evidence to show that the horse sales were exempt.

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ABB v. Missouri
Albany International Corp. v. Wisconsin
Allied-Signal, Inc. v. New Jersey
AE Outfitters Retail v. Indiana
American Power Conversion Corp. v. Rhode Island
Citicorp v. California
Citicorp v. Maryland
Clorox v. New Jersey
Colgate Palmolive Co. v. California
Consolidated Freightways v. California
Container Corp. v. California
Crestron v. New Jersey
Current, Inc. v. California
Deluxe Corp. v. California
DIRECTV, Inc. v. Indiana
DIRECTV, Inc. v. New Jersey
Dow Chemical Company v. Illinois
DuPont v. Michigan
EchoStar v. New York
Express, Inc. v. New York
Farmer Bros. v. California
General Motors v. Denver
GMRI, Inc. (Red Lobster, Olive Garden) v. California
GTE v. Kentucky
Hair Club of America v. New York
Hallmark v. New York
Hercules Inc. v. Illinois
Hercules Inc. v. Kansas
Hercules Inc. v. Maryland
Hercules Inc. v. Minnesota
Hoechst Celanese v. California
Home Depot v. California
Hunt-Wesson Inc. v. California
IGT v. New Jersey
Intel Corp. v. New Mexico
Kohl's v. Indiana
Kroger v. Colorado
Lorillard Licensing Company v. New Jersey
Lorillard Tobacco Co. v. Michigan
McGraw-Hill, Inc. v. New York
MCI Airsignal, Inc. v. California
McLane v. Colorado
Mead v. Illinois
Meredith v. New York
Nabisco v. Oregon
National Med, Inc. v. Modesto
Nerac, Inc. v. New York
NewChannels Corp. v. New York
OfficeMax v. New York
Osram v. Pennsylvania
Panhandle Eastern Pipeline Co. v. Kansas
Pier 39 v. San Francisco
Powerex Corp. v. Oregon
Rent-A-Center v. Oregon
Reynolds Metals Company v. Michigan
Reynolds Metals Company v. New York
R.J. Reynolds Tobacco Co. v. New York
San Francisco Giants v. San Francisco
Science Applications International Corporation v. Maryland
Scioto Insurance Company v. Oklahoma
Sears, Roebuck and Co. v. New York
Shell Oil Company v. California
Sherwin-Williams v. Massachusetts
Sparks Nugget v. Nevada
Sprint/Boost v. Los Angeles
Tate & Lyle v. Alabama
Thomson Reuters v. Michigan
Toys "R" Us-NYTEX, Inc. v. New York City
Union Carbide Corp. v. North Carolina
United States Tobacco v. California
UPS v. New Jersey
USV Pharmaceutical Corp. v. New York
USX Corp. v. Kentucky
Verizon Yellow Pages v. New York
Wendy's International v. Illinois
Wendy's International v. Virginia
Whirlpool Properties v. New Jersey
W.R. Grace & Co.—Conn. v. Massachusetts
W.R. Grace & Co. v. Michigan
W.R. Grace & Co. v. New York
W.R. Grace & Co. v. Wisconsin

WHEN THESE COMPANIES HAD DIFFICULT STATE TAX CASES, THEY SOUGHT OUT MORRISON & FOERSTER LAWYERS.

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